A **MALAYSIA AIRPORTS (SEPANG) SDN BHD & ANOR**

v.

FEDERAL EXPRESS BROKERAGE SDN BHD & ORS; PEGUAM NEGARA MALAYSIA (INTERVENER)

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
C ABDULL HAMID EMBONG FCJ
HASAN LAH FCJ
[CIVIL APPEAL NO: 02-(F)-72-10-2012(W)]
24 SEPTEMBER 2013

D ***ADMINISTRATIVE LAW:*** *Remedies - Declaration - Free zone charges imposed for commercial activities carried out at KLIA Free Commercial Zone - Decision of Minister of Finance to impose charges - Refusal to pay - Whether Minister had power to impose charges - Functions of appellants - Whether to administer, maintain and operate*
E *free zone - Whether appellants had authority to collect charges - Distinction between tax and fee - Whether charges imposed used for providing facilities and services in free zone - Free Zones Act 1990, ss. 3, 10(3) & 13(2) - Free Zones Regulations 1990, reg. 8A*

F ***WORDS & PHRASES:*** *"Condition" - Meaning of - Free Zones Act 1990, s. 10(3) - Free zone charges imposed for commercial activities carried out at KLIA Free Commercial Zone - Whether word "condition" viewed as payment for facilities and services rendered by authority - Whether Minister of Finance given wide powers to impose "conditions" which he deems fit*

G

Pursuant to s. 3(1) of the Free Zones Act 1990 ('the Act'), the Kuala Lumpur International Airport Free Commercial Zone ('FCZ') was declared a free commercial zone by the Minister of Finance ('Minister'). The first appellant was appointed by the Minister to
H administer, maintain and operate the FCZ under s. 3(2) of the Act. The respondents were companies that had been operating in the FCZ and they had carried out commercial activities since 1997. A free zone charge was imposed on all persons carrying out commercial activities at the FCZ and the said charge was to be
I paid to the first appellant which maintained the free zone. Due to problems in payment, the Free Zones Regulations 1991 ('Regulations') was amended to insert a new reg. 8A. Dispute

arose between the parties as to the standard to be established to determine the charges and since an agreement could not be reached, the Minister made a decision to maintain the charge which was set at RM5 per approved customs declaration and this was conveyed *vide* the Minister's letter dated 18 May 2007. The respondents refused to pay the charge and commenced an action in the High Court seeking, *inter alia*, the following declarations, *ie*, (i) that the letter dated 18 May 2007 was void *ab initio* and/or contrary to law; and (ii) that the appellants had no authority to collect the charge. The High Court dismissed the respondents' action and decided that the Minister had the power to impose conditions in the form of charges based on s. 10(3) and s. 13(2) of the Act. However, the Court of Appeal reversed the High Court's decision and held, *inter alia*, that (i) s. 10(3) and s. 13(2) of the Act did not show the Parliament's intention to confer on the Minister a discretion or power to impose any charge or levy in respect of activities carried out in the FCZ; and (ii) by imposing such levy, reg. 8A of the Regulations was null and void being *ultra vires* the Act. Dissatisfied, the appellants appealed to this court. The respondents, however, contended that (i) the FCZ charges were in substance and reality a tax, duty, levy or a pecuniary burden; and (ii) reg. 8A of the Regulations intended to legitimise the collection of the FCZ charges and not in consideration of any defined services. On 18 September 2012, this court allowed the Attorney General of Malaysia to intervene in the proceedings and to be an intervener in this appeal to appeal against the whole decision of the Court of Appeal. The question of law posed in this appeal was whether the Minister had power under the Act to impose charges on activities carried out or for facilities and services provided under the said Act.

Held (allowing appeal with costs; setting aside decision of Court of Appeal)

Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) A tax may be described as the money that a government levies upon an individual or business for having performed a particular action or completed a particular transaction. For a payment to be a tax, the criteria required to be satisfied are: (i) the payment is compulsorily imposed; (ii) the payment is enforceable by law; (iii) there must be compulsion to pay; and (iv) the imposition of the payment is for a public purpose. On the other hand, a fee, even if it is a charge paid to the

A government by individuals or by a business, is specifically applied for the use of a service. Money from the fee is generally not applied to use other than to provide service for which the fee is charged. Usually, a fee rate is directly tied to the cost of maintaining the service (*Lower Mainland Dairy*
B *Products Sales Adjustment Committee v. Crystal Dairy Ltd*; refd). (paras 11, 12 & 20)

(2) Section 4 of the Act expressly provides that goods and services of any kind except those prohibited by law may be
C brought into, produced, manufactured or provided in a free zone without payment of any customs duty, excise duty, sales tax or service tax. Therefore, under s. 4, no tax is collected for the purposes of the activities carried out in a free zone. Further, reg. 8A of the Regulations had been validly enacted
D pursuant to s. 47 of the Act. (paras 13 & 15)

(3) In view of the appellants' function to administer, maintain and operate the free zone, the Minister was justified in imposing the condition of the charge on persons using the facilities and services provided in the free zone. This was allowed under
E s. 10(3) of the Act. This section, when read together with s. 13(2) of the Act, confers powers on the Minister to give directions that are necessary to the relevant authority and in the present case, to the appellants for the proper functioning
F of a free zone. (para 17)

(4) The word "condition" in s. 10(3) of the Act viewed within the context of the present case is the payment for the facilities and services rendered by the authority, *ie*, administering, maintaining and operating the free zone area. Further, s. 10(3)
G gives the Minister wide powers to impose "conditions" which he deems fit for the purposes of carrying out any activity in the free zone. This would include imposing a charge or fee for the benefit of the authority for providing the facilities and services in the free zone. A charge or a fee imposed is not for
H the public purpose or for the purposes of the Federation (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd*; dist). Thus, the question posed in this appeal was answered in the affirmative. (paras 18, 19 & 21)

I

Bahasa Malaysia *Translation Of Headnotes*

Berikutan s. 3(1) Akta Zon Bebas 1990 ('Akta'), Zon Perdagangan Bebas Lapangan Terbang Antarabangsa Kuala Lumpur ('ZPB') telah diisytiharkan sebagai zon perdagangan bebas oleh Menteri Kewangan ('Menteri'). Perayu pertama telah dilantik oleh Menteri untuk mentadbir, menyelenggara dan mengendalikan ZPB di bawah s. 3(2) Akta. Pihak responden merupakan syarikat-syarikat yang telah beroperasi di ZPB dan menjalankan aktiviti-aktiviti perdagangan sejak tahun 1997. Caj zon bebas telah dikenakan atas semua pihak yang menjalankan aktiviti perdagangan di ZPB dan caj tersebut perlu dibayar kepada perayu pertama yang menjaga zon bebas tersebut. Disebabkan masalah untuk membayar caj tersebut, Peraturan Zon Bebas 1991 ('Peraturan') telah dipinda untuk memasukkan per. 8A yang baru. Pertikaian berbangkit antara pihak-pihak berkenaan tahap untuk ditetapkan bagi menentukan caj dan oleh sebab suatu perjanjian tidak dapat dicapai, Menteri telah membuat keputusan untuk mengekalkan caj yang ditetapkan pada RM5 bagi setiap deklarasi kastam yang diluluskan dan perkara ini disampaikan melalui surat Menteri bertarikh 18 Mei 2007. Pihak responden enggan membayar caj tersebut dan memulakan tindakan di Mahkamah Tinggi dengan menuntut, antara lain, deklarasi-deklarasi berikut, iaitu, (i) bahawa surat bertarikh 18 Mei 2007 adalah terbatal dan/atau bertentangan dengan undang-undang; dan (ii) bahawa perayu-perayu tidak mempunyai kuasa untuk mengutip caj tersebut. Mahkamah Tinggi menolak tindakan pihak responden dan memutuskan bahawa Menteri mempunyai kuasa untuk mengenakan syarat-syarat dalam bentuk caj berdasarkan s. 10(3) dan s. 13(2) Akta. Sebaliknya, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dan memutuskan, antara lain, bahawa (i) s. 10(3) dan s. 13(2) Akta tidak menunjukkan niat Parlimen dalam memberi budi bicara kepada Menteri untuk mengenakan caj atau levi bagi aktiviti-aktiviti yang dijalankan di ZPB; dan (ii) dengan mengenakan levi sebegitu, per. 8A Peraturan adalah batal dan tidak sah menjadikannya *ultra vires* Akta. Tidak berpuas hati, perayu-perayu merayu ke mahkamah ini. Responden-responden, walau bagaimanapun, menghujahkan bahawa (i) caj ZPB sebenarnya merupakan suatu cukai, duti, levi atau beban kewangan; dan (ii) per. 8A Peraturan berniat untuk mengesahkan kutipan caj ZPB dan bukannya bagi sebarang perkhidmatan yang ditentukan. Pada 18 September 2012, mahkamah telah membenarkan Peguam Negara Malaysia untuk mencelah dalam rayuan ini terhadap keseluruhan keputusan Mahkamah Rayuan. Persoalan undang-undang yang diutarakan dalam rayuan ini adalah

A sama ada Menteri mempunyai kuasa untuk mengenakan caj atas aktiviti-aktiviti yang dijalankan atau untuk kemudahan dan perkhidmatan yang dinyatakan di bawah Akta.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan
B **keputusan Mahkamah Rayuan)**
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Cukai boleh ditakrifkan sebagai wang yang dilevi oleh kerajaan atas seseorang individu atau perniagaan kerana melaksanakan
C sesuatu tindakan atau menyelesaikan sesuatu transaksi. Bagi mencukai suatu bayaran, kriteria yang perlu dipatuhi adalah: (i) pengenaan bayaran secara wajib; (ii) bayaran boleh dikuatkuasakan di bawah undang-undang; (iii) perlu ada paksaan untuk membayar; dan (iv) pengenaan bayaran adalah
D bagi kehendak awam. Sebaliknya, suatu fi, walaupun ianya adalah caj yang dibayar kepada kerajaan oleh individu atau perniagaan, secara spesifik digunakan untuk suatu perkhidmatan. Wang daripada fi secara amnya tidak akan digunakan melainkan untuk menyediakan perkhidmatan untuk tujuan fi
E tersebut dikenakan. Selalunya, kadar fi terikat secara langsung kepada kos menyenggarakan perkhidmatan itu (*Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd*; dirujuk).

F **(2)** Seksyen 4 Akta secara nyata mentakrifkan bahawa barangan dan servis dalam apa jua jenis, selain daripada yang dilarang di bawah undang-undang, boleh dibawa, dikeluarkan, atau disediakan dalam suatu zon bebas tanpa bayaran dalam bentuk duti kastam, duti eksais, cukai jualan atau cukai perkhidmatan.
G Oleh itu, di bawah s. 4, tiada cukai dikutip bagi tujuan aktiviti-aktiviti yang dijalankan di zon bebas. Tambahan, per. 8A Peraturan telah digubal dengan sah menurut s. 47 Akta.

(3) Memandangkan fungsi perayu-perayu adalah untuk mentadbir,
H menyelenggara dan mengendalikan zon bebas, Menteri adalah wajar dalam mengenakan syarat caj atas pihak-pihak yang menggunakan kemudahan dan perkhidmatan yang disediakan dalam zon bebas. Ini dibenarkan di bawah s. 10(3) Akta. Seksyen ini, apabila dibaca bersama-sama dengan s. 13(2)
I Akta, memberi kuasa kepada Menteri untuk memberi arahan yang berpatutan kepada pihak berkuasa yang relevan dan dalam kes ini, kepada perayu-perayu bagi pengendalian teratur zon bebas.

(4) Perkataan "syarat" dalam s. 10(3) Akta, dilihat dalam konteks kes ini, merupakan bayaran untuk kemudahan dan perkhidmatan yang diberikan oleh pihak berkuasa, iaitu, mentadbir, menyelenggara dan mengendalikan kawasan zon bebas. Selanjutnya, s. 10(3) memberikan kuasa luas kepada Menteri untuk mengenakan "syarat" yang dianggap sesuai bagi tujuan menjalankan sebarang aktiviti dalam zon bebas. Ini merangkumi pengenaan caj atau fi bagi faedah pihak berkuasa dalam menyediakan kemudahan-kemudahan dan perkhidmatan dalam zon bebas. Caj atau fi yang dikenakan bukanlah untuk kehendak awam atau untuk Persekutuan. (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd*; dibezakan). Oleh itu, persoalan yang diutarakan dalam rayuan ini dijawab secara afirmatif.

Case(s) referred to:

Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd [1933] AC 168 ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 96

Free Zones Act 1990, ss. 3(1), (2), 4, 10(3), 13(1), (2), (4), 15(1), 16(1), 47

Free Zones Regulations 1991, reg. 8A(2)

For the appellants - Jasmeetpal Singh (G Pria with him); M/s Siew & Jasmeet

For the respondent - Tommy Thomas (Elaine Yap & Azmimi Pharmy with him); M/s Wong & Partners

For the intervener - Amarjeet Singh; SFC

[Editor's note: For the Court of Appeal judgment, please see Federal Express Brokerage Sdn Bhd & Ors v. Malaysia Airport (Sepang) Sdn Bhd & Anor [2013] 4 CLJ 208.]

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal given on 13 December 2011 allowing the appeal by the respondents against the decision of the High Court.

A On 18 September 2012 this court had allowed the Attorney General of Malaysia to intervene in the proceedings and be an intervener in this appeal. Leave was granted to the appellants and the intervener to appeal against the whole of the decision of the Court of Appeal on the following question of law:

B

> Whether the Minister of Finance has power under the Free Zones Act 1990 (Act 438) to impose charges on activities carried out or for facilities and services provided under the said Act?

Background Facts

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[2] The relevant background facts of the case are as follows:

(i) The Kuala Lumpur International Airport ("KLIA") Free Commercial Zone ("FCZ") was declared a free commercial zone by the Minister of Finance ("the Minister") pursuant to s. 3(1) of the Free Zones Act 1990 ("the Act").

D

(ii) The first appellant was appointed by the Minister to administer, maintain and operate the KLIA FCZ under s. 3(2) of the Act.

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(iii) The respondents are companies that had been operating in the KLIA FCZ carrying out commercial activities since 1997. They are members of the Air Freight Forwarder Association of Malaysia ("AFAM") as well as the Conference of Asia Pacific Express Carriers ("CAPEC").

F

(iv) A free zones charge was imposed on all persons carrying out commercial activities at the KLIA FCZ. The charge is paid to the first appellant which maintains the free zone.

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(v) Due to problems of payment of the charges to the first appellant the Free Zones Regulations 1991 were amended *vide* P.U.(A) 166/2007 to insert a new reg. 8A which came into force on 20 April 2007.

H

(vi) There was a dispute between AFAM and CAPEC as to how the charge was to be established. It was clear that a charge was to be paid but the dispute was on the standard to be established to determine the charge.

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(vii) When AFAM and CAPEC could not reach an agreement the Minister made a decision to maintain the charge set at RM5 per approved customs declaration and this was conveyed to the AFAM by letter dated 18 May 2007.

(viii) In this letter it was also made known that the first appellant could not continue to maintain and operate the KLIA FCZ if the charges were not paid by AFAM's members.

(ix) The respondents refused to pay the charge and commenced an action seeking, amongst others, the following declarations against the appellants:

(a) The letter issued by the Ministry of Finance dated 18 May 2007 is void *ab initio* and/or contrary to law;

(b) A declaration that the appellants have no authority to collect the charge; and

(c) A declaration that the first appellant return all monies collected from the respondents from the year 2000.

(x) The first appellant counterclaimed the outstanding charges not paid by the respondents.

Decision Of The High Court

[3] The High Court in dismissing the respondent's action *inter alia* held that the Minister had the power to impose conditions in the form of charges based on ss. 10(3) and 13(2) of the Act. The commercial activities carried out by the respondents fell within the First Schedule of the Act. The conditions that the Minister may impose were in respect of the activities that the respondents carried out in the free zone.

Decision Of The Court Of Appeal

[4] The Court of Appeal reversed the decision of the High Court. In arriving at its decision the Court of Appeal applied the principle on the imposition of a tax as stated by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97. The said principle states that before a tax can be imposed there must be clear words conferring such power to impose tax and that such words must be given strict construction. The Court of Appeal then applied the principle to s. 10(3) and s. 13(2) of the Act and arrived at the following conclusion:

> We are of the view that the language of both sections 10(3) and 13(2) of the Act on the face of it does not show any intention on part of the Parliament to confer on the Minister of Finance a

A discretion or power to impose any charge or levy in respect of activities carried out in the FCZ but merely seeks to provide the types of activities and administration that can be allowed in the FCZ.

B The Court of Appeal then held that as a result of their finding, reg. 8A of the Free Zones Regulations 1991 by imposing such levy is null and void being *ultra vires* the Act.

The Contention Of The Appellants And The Intervener

C **[5]** Learned Senior Federal Counsel for the intervener and learned counsel for the appellants submitted before us that s. 10(3) read with s. 13(2) of the Act is not a taxing statute. The charge that is imposed is not a tax or levy. Only if the charge falls within the meaning of a tax or levy would the principle in *Palm* D *Oil Research* then applies.

[6] It was also submitted for the appellants and the intervener that from the wordings of reg. 8A of the Free Zones Regulations 1991 ("the Regulations"), it is clear that the charge is levied on E persons who carry out activities in a free zone. It is not addressed to the public at large or to a class of the public. It is only for those who choose to carry out their business in the free zone. The payment is enforceable by law. This is provided by reg. 8A(2). The arrears are treated as a civil debt and the F authority may enforce it under the law for recovery of such debt. Regulation 8A of the Regulations reads as follows:

> (1) Where the Minister so directs, a free zones charge shall be payable by any person or his agent to the Authority in respect of every approved declaration under regulations 5, G 21, 22, 23, 24, 25, 26, 27 and 28.
>
> (2) Any free zone charge which is not paid within such period as may be prescribed by the Authority, or in arrears shall be treated as a civil debt owed by the person or his agent to the Authority and the Authority may avail itself of such H means under the law for the recovery of such debt.

The Contention Of The Respondents

[7] Learned counsel for the respondents in support of the decision of the Court of Appeal submitted amongst others that I the FCZ charge is in substance and reality a tax, duty, levy or a pecuniary burden. The FCZ charges are not collected pursuant to any agreement and therefore there is no contractual basis for it.

It was also the contention of the respondents that the amendment made by the addition of reg. 8A to the Regulations with effect from 20 April 2007 was intended to legitimize the collection of the FCZ charges and not in consideration of any defined services. It is rather a charge collected as a form of revenue. In the circumstances it was submitted that the Court of Appeal was correct in characterising the FCZ charge as a form of tax duty, levy or a pecuniary burden on a corporate citizen that is purported to have legislative basis when in fact it was not provided for under the Act.

[8] It was further submitted for the respondents that the said Act is not a taxing statute. In support art. 96 of the Federal Constitution was referred to which provides as follows:

> No tax or rate shall be levied by or for the purpose of the Federation except by or under the authority of the Federal law.

[9] It was contended for the respondents that the courts must take a purposive approach in the interpretation of any statute. The courts must ask the question whether the Act was intended by Parliament to be a taxing statute. To the respondents the principal operative effect of the Act is to enable goods and services (except prohibited goods and services) to be brought into, produced, manufactured or provided in a free zone without payment of any customs duty, excise duty, sales tax or service tax. The plain words of ss. 10(3) and 13(2) of the Act do not show any intention on the part of Parliament to confer on the Minister a discretion to impose any charge or levy in respect of activities carried out in the FCZ. It is the contention of the respondents that taxing statutes are to be construed strictly. The requirement for clear, expressed and unambiguous language in a taxing statute is well established. (See the case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd (supra)*.

[10] The respondents further contended that as ss. 10(3) and 13(2) of the Act do not confer upon the Minister's powers to impose any FCZ charges, it necessarily follows that reg. 8A of the Regulations is in turn also *ultra vires* the Act. A subsidiary legislation must be subservient to the principal legislation.

A

Decision Of This Court

[11] We are of the view the test whether a particular written law is a taxing statute is as stated by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd* [1933] AC 168 at p. 175 as follows:

B

> In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under section 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be *prima facie* evidence in all Courts that such amount is due by the dairy farmer (section 11). A dairy farmer who fails to comply with every determination, order or regulation made by a Committee under the Act is to be guilty of an offence against the Act (section 13), and to be liable to a fine under section 19. Compulsion is an essential feature of taxation: *City of Halifax v. Nova Scotia Car Works, Ltd* [1914] AC 992. Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes.

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[12] From the above cited case, for a "payment" to be a tax, the criteria required to be satisfied is as follows:

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(i) The payment is compulsorily imposed;

(ii) The payment is enforceable by law;

(iii) There must be compulsion to pay; and

(iv) The imposition of the payment is for a public purpose.

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[13] On the question whether the charge is levied for a public purpose or for purposes of the Federation, we are of the view that the legislative scheme of the Act must be considered. Section 4 of the Act expressly provides that goods and services of any kind except those prohibited by law may be brought into, produced, manufactured or provided in a free zone without payment of any customs duty, excise duty, sales tax or services tax. Therefore under s. 4 of the Act no tax is collected for the purposes of the activities carried out in a free zone.

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[14] It is our considered view in enacting reg. 8A of the Regulations the Legislature has taken into consideration the following provisions of the Act:

(i) Section 10(3) which provided that:

> Notwithstanding anything to the contrary in any written law, the Minister may allow any activity to be carried out in a free zone subject to such conditions as he may deem fit to impose.

(ii) Section 13(2) which provided that:

> The Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone ...

(iii) Section 47 which provided that:

> The Minister may make regulations as may be necessary or expedient for giving full effect to the provisions of this Act or the carrying out of the purposes of this Act.

[15] As regards whether reg. 8A of the Regulations is *ultra vires* the Act, we are of the view reg. 8A has been validly enacted pursuant to s. 47 of the Act. We noted that the very letter issued by the Ministry of Finance dated 18 May 2007 which the respondents sought to declare void provides *inter alia* as follows:

> Malaysia Airport (Sepang) Sdn Bhd (MAB) sebagai Pihak Berkuasa Zon di Kawasan Perdagangan Bebas di KLIA telah melaporkan ke Kementerian ini bahawa amaun tertunggak caj pemprosesan FCZ pada 14 Mei 2007 adalah sebanyak RM24,092,834. MAB juga memaklumkan bahawa mereka tidak boleh beroperasi sekiranya menanggung kerugian dan akan hanya terus sanggup menjadi Pihak Berkuasa Zon di FCZ KLIA sekiranya tunggakan tersebut dijelaskan.

[16] The letter dated 18 May 2007 from the Ministry of Finance shows that the appellants are incurring losses and cannot continue to carry on its functions to administer, maintain and operate the free zone. To administer, maintain and operate the free zone the first appellant is required by Part III of the Act to do the following things:

(i) to provide and maintain or allow in the free zone such facilities for the proper and efficient functioning of the zone (s. 13(1));

A (ii) to provide adequate enclosures for the movement of persons, conveyances, vessels and goods entering and leaving a free zone (s. 13(4));

(iii) no entry or residence in a free industrial zone without
B permission of the authority (s. 15(1)); and

(iv) to order the exclusion or removal of goods or to discontinue activities which are dangerous or prejudicial to public interest, health or safety (s. 16(1)).

C **[17]** We agree with the submission of learned counsel for the intervener that in view of the appellants' function to administer, maintain and operate the free zone the Minister is justified in imposing the condition of the charge on persons using the facilities and services provided in the free zone. This is in our view allowed
D under s. 10(3) of the Act. This section when read together with s. 13(2) of the Act confers on the Minister powers to give directions that are necessary to the relevant authority and in the present case to the appellants for the proper functioning of a free zone.

E

[18] As regards the meaning to be attached to the word "condition" in s. 10(3) of the Act so as to include a form of payment we would refer to the *New Shorter Oxford English Dictionary* that defines "condition" to mean "a thing demanded or
F required as a prerequisite to the granting or performance of something else". In our view in the context of the present case the condition is the payment for the facilities and services rendered by the authority, that is administering, maintaining and operating the free zone area.

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[19] It is our judgment s. 10(3) of the Act is of wide import and gives the Minister very wide powers to impose "conditions" he deems fit for the purposes of carrying out any activity in the free zone. This would include imposing a charge or fee for the benefit
H of the authority for providing the facilities and services in the free zone. It is our judgment that a charge or a fee imposed is not for the public purpose or for the purposes of the Federation. The present case can be distinguished from the case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium*
I *Vegetable Oils Sdn Bhd (supra)* cited in support of the respondent's case in that in the *Palm Oil Research*'s case the "cess" or the tax levied goes to the government as its revenue unlike in the present case.

Conclusion

[20] Thus, in brief, the distinction between a tax and a fee is this: a tax may be described as the money that a government levies upon an individual or business having performed a particular action or completed a particular transaction, whereas a fee, even if it is a charge paid to the government by individuals or by a business, is specifically applied for the use of a service. Money from the fee is generally not applied to uses other than to providing the service for which the fee is applied. And usually a fee rate is directly tied to the cost of maintaining the service.

[21] For the reasons abovestated we would answer the question posed in this appeal in the affirmative. In the result we would allow this appeal with costs. The order of the Court of Appeal is set aside and the order of the High Court is hereby restored. We make an order of costs of RM50,000 to be paid by the respondents to the appellants and no order of costs to the intervener. Deposit is to be refunded to the appellants.